

~~SECRET~~

*Security -
Ch. O. H. J.
Ch. Personnel
JAN*

OGC HAS REVIEWED.

2 August 1956

MEMORANDUM FOR: General Counsel

SUBJECT: Delegation of Authority to Terminate under
Executive Order 10450

REFERENCE: Memorandum for General Counsel dated 25 June 1956;
Subject: Delegation of Authority to Terminate
Employment Under Executive Order 10450

1. I spoke with Mr. Meloy of the Civil Service Commission who advised me that this question fell within the jurisdiction of the Attorney General rather than the Commission. On his suggestion I telephoned Assistant Attorney General Tompkins and in his absence spoke with Mr. Doherty, his assistant. Mr. Doherty telephoned me on 1 August and said that after checking into the matter thoroughly, it was his opinion that an agency head, under 10450, could not delegate the final termination authority, although he could delegate final review. The net effect of this is that an agency head need not read the whole file but may make his decision based upon a summary of salient points prepared by subordinate officials.

2. I asked Mr. Doherty how he reconciled this with the decision in Muerer v. Ryder. He said that in that case, the Assistant Secretary of the Navy for Air had signed a memorandum to Mr. Muerer at the direction of the Secretary of Navy embodying the Secretary's decision.

3. Doherty stated that it would be perfectly proper for the Director of Personnel, for example, to sign a memorandum to an employee stating that he was "terminated by direction of the Director of Central Intelligence." This presupposes a decision by the Director conveyed verbally to the official whom he has designated to handle the paper work.

FOIAB5

25X1A9A

~~SECRET~~

Assistant General Counsel

SECRET

OR 11/11/3
CR. Personnel 16
12/14

25 June 1956

MEMORANDUM FOR: General Counsel

SUBJECT: Delegation of Authority to Terminate Employment
Under Executive Order 10450

1. Executive Order 10450 is issued primarily under the authority of the Act of 26 August 1950 (Public Law 733, 81st Congress).

2. Senate Report Number 2158, 25 July 1950 (cited at 1950 U.S. Code Cong. 3278) provides (at page 3280):

"It is the intention that the head of the department can delegate his authority to suspend an employee, but he cannot delegate his power to terminate the services of an employee who has been suspended under this legislation."

3. As the attachment demonstrates, the Executive Order provides for the delegation of all authorities lodged in the agency head except that of final termination.

4. Despite the foregoing clear language, investigation has disclosed the following:

a. Department of the Navy (Mr. Logsdon, x 53694): Final termination decision may be made by anyone at the secretarial level (Secretary, Under Secretary or the several Assistant Secretaries). This is apparently on the theory that the term "agency head" includes all presidential appointees. This would appear to be a somewhat novel theory.

b. Department of the Army (Mr. C. Donald Garrett, x 55817): Final termination decision retained in the Secretary, but in actual fact, except for the occasional sticky case which the Secretary himself might wish to be informed about, the signature on the final decision is that of Mr. Martin, a GS-17 "Chief Clerk" to the Secretary, who signs not on his own authority but "for the Secretary."

c. Department of the Air Force (Mr. Julien, x 76030/53376): The authority here seems to be vested in the Assistant Secretary for Management, but the signature on the final decision is that of his Deputy for Administration, who signs a statement to the

SECRET

SECRET

effect that the Assistant Secretary has made a decision. Air stated that this is not considered a delegation since the Assistant Secretary within his area of responsibility has "concurrent jurisdiction" with the Secretary; this is alleged to be based on the statute creating the position.

d. Department of Defense (Mr. Ray Loughton, x 77171): States that they probably haven't had more than one case, because they have less personnel than in the subordinate departments, but that if a case came up the Secretary himself would make the final decision.

e. Conversation with Colonel Rubinstein (x 78366), who is responsible at the Defense level for coordinating the security programs of the subordinate departments indicates that he has a somewhat different view from that expressed by the departments themselves. He states that whatever may happen in the way of paper shuffling, he deals with the Assistant Secretaries and that as he understands it they handle these cases "all the way through." I asked him if he considered that they were acting in their own authority or in the name of the Secretaries and he said that he believed they were acting for the Secretaries.

5. From the foregoing, I would conclude that either the Director or the Deputy Director of Central Intelligence, because of the alter ego character of the Deputy, could make the final decision to terminate. In addition, the sanctioned practice indicates that another official or officials of the Agency (e.g., Director of Security, General Counsel, or the Director's Administrative Assistant, [redacted] could be authorized to sign the operative document "For the Director." However, any attempt at express delegation (so that a designee had the authority to make a determination in his own name) seems improper under both the statute and the Executive Order. If "delegation" (in any sense) below the level of the Deputy Director of Central Intelligence is contemplated, I recommend we secure the formal or informal opinion of the Attorney General.

25X1

25X1A9A

[redacted]

Assistant General Counsel

SECRET

EXECUTIVE ORDER 10450

Security Requirements for
Government Employment

April 27, 1953

"SEC. 2. The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

"SEC. 3. (b) The head of any department or agency shall designate, or cause to be designated, any position within his department or agency the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security as a sensitive position. . .

"SEC. 4. The head of each department and agency shall review, or cause to be reviewed, the cases of all civilian officers and employees with respect to whom there has been conducted a full field investigation under Executive Order No. 9835 of March 21, 1947, and, after such further investigation as may be appropriate, shall re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, such of those cases as have not been adjudicated under a security standard commensurate with that established under this order.

"SEC. 5. Whenever there is developed or received by any department or agency information indicating that the retention in employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, such information shall be forwarded to the head of the employing department or agency or his representative, who, after such investigation as may be appropriate, shall review, or cause to be reviewed, and, where necessary, re-adjudicate, or cause to be re-adjudicated, in accordance with the said act of August 26, 1950, the case of such officer or employee.

"SEC. 6. Should there develop at any stage of investigation information indicating that the employment of any officer or employee of the Government may not be clearly consistent with the interests of the national security, the head of the department or agency concerned or his representative shall immediately suspend the employment of the person involved if he deems such suspension necessary in the interests of the national security and, following such investigation and review as he deems necessary, the head of the department or agency concerned shall terminate the employment of such suspended officer or employee whenever he shall determine such termination necessary or advisable in the interests of the national security, in accordance with the said act of August 26, 1950."

6 June 1956

25X1A9A

Mr. -

FOIAB5

FOIAB5

In connection with the attached you will note in paragraph 6 we state that action under P. L. 733 and E. O. 10450

I think it might be desirable if we were to ascertain the full effect of section 22 (a) of 5 U. S. C. A. which authorizes heads of agencies to delegate authority relating to employment of personnel on either of these two authorities. There are two parts to the query (a) whether as a matter of law the Director could delegate either or both and (b) with respect to the 10450 program has he already done so?

25X1A

JSW

*GIAO Digest check on
5 USC 222 revealed
two cites:*

*35CG 21 medical sp
35CG 236 admt allg*

*Refers to LS 6-1213,
"Termination of
Employees" Prohibition
dated 4 June 56
filed in Personnel 16*

SECRET

LS 6-1213

4 June 1956

MEMORANDUM FOR: Security Office

ATTENTION:

Mr.

25X1A9A

SUBJECT:

Termination of Probationary Employees

1. Attached for your consideration is a copy of the opinion of Haynes v. Thomas decided in the United States Court of Appeals for the District of Columbia on 19 April 1956. The substance of this opinion is that the Government may not utilize its authority to terminate a probationary employee under the normal administrative authorities applicable to such employees when, in fact, the case is a security case. When it is a security case, the Court held that the procedures provided by Public Law 733 (5 U. S. C. 22-1) must be followed. This law was extended to all agencies and departments of the Government by Executive Order 10450.

2. In connection with termination of probationary employees, i. e., those who have not satisfactorily served one full year, the Government generally and CIA are authorized by proper personnel action to terminate an employee based on a determination that he is not satisfactorily performing the job. There is no appeal from such action and the decision of the proper personnel officer is final. In fact, in such cases the Government is not obligated by statute to furnish any explanatory notice to the employee.

3. Public Law 733 authorizes the Agency head "in his absolute discretion and when deemed necessary in the interest of national security" to suspend, without pay, "any civilian officer or employee." There are several provisos, however. The first in effect states that to the extent the Agency head determines that the interests of the national security permit, the employee shall be notified of the reasons for his suspension and within thirty days the employee may submit statements to show why he should be reinstated. Thereafter the Agency

SECRET

SECRET

head may, after reviewing the case, terminate the employment of the individual. The second proviso relates to persons who have completed their probationary period and provides for additional procedural safeguards such as the written statement of charges and a hearing before a 10450 Board. The statute also specifically states that the decision of the Agency head is conclusive and final. In this connection the Court stated in Haynes v. Thomas: "We have said repeatedly that Courts will not review the action of executive officials in dismissing executive employees except to insure compliance with statutory requirements."

4. In Haynes v. Thomas, Haynes, the employee, had not completed his probationary period and he was informed by letter that derogatory information had been received which raised a question concerning his continued employment in connection with the Government's security program. After an interview with Haynes, a personnel action was signed terminating the employee "during trial period." The notice of personnel action further indicated that the separation was based on the Executive Order 10450 program. The procedural requirements of P. L. 733 were not followed in this case. Since he was a probationary employee all that was required was that he be notified of the reasons for suspension and be permitted an opportunity to submit statement or affidavits to show why he should be reinstated. The Court then held that he was wrongfully discharged and should be reinstated. The Court further pointed out that when he has been reinstated the Government could then suspend him again and follow the procedure in the statute.

5. Your office has previously raised the question in certain cases of probationary employees who were entered on duty prior to completion of final investigation. It had been considered that in those cases where the results of the investigation were such that the employee should not receive a security clearance, he would be terminated by personnel action and within the procedures applicable to administrative terminations since he had no appeal rights as a probationary employee. In view of the decision in Haynes v. Thomas, it is our view that if the Agency were to follow such a procedure the aggrieved employee could successfully appeal to the Courts for reinstatement under the doctrine of Haynes v. Thomas.


SECRET

SECRET

6. We are left then with two alternatives in handling the cases described. We can utilize Public Law 733 and Executive Order 10450 issued under that law or we could utilize the authority available to the Director of Central Intelligence under section 102(c) of the National Security Act. In either event action by the Director would be required, whereas under the previously considered method action could have been taken in the Personnel Office. However, you will note that under the 10450 program, there is no requirement for a Board and we would see no reason why a Board should be established if 102(c) were to be used. In utilizing the 10450 approach, you will note that there is only one simple procedural step required by law and that is a notification of the reasons for the suspension to the extent that the interests of national security permit, with subsequent opportunity within thirty days for the employee to submit statements. In 10450 cases a suspension is mandatory prior to final termination and such action appears appropriate for the types of cases being considered. Thereafter the determination of the Director of Central Intelligence is conclusive and final. It is suggested that if 102(c) were used that the procedural requirement under 10450 be followed since it would appear to cause no great burden and in this circumstance suspension would be a matter of discretion with the Agency.

7. As a final thought, we suggest that the 10450 approach may have considerable merit in that under the security program within the Agency, as we understand it, the Civil Service Commission records will show that in every case which they have forwarded to us for processing under 10450, there has been a clearance except for some cases of resignations pending final action. Where terminations are involved they would show in Civil Service records as under 102(c). Therefore, since the procedural requirements under the 10450 program for probationary employees are not burdensome and if the Agency believes the employee should be terminated, there may be a useful purpose served by handling such cases under 10450 to balance the ledger in the Civil Service records.

25X1A9A


Deputy General Counsel

Attachment

IG (6/7/56)
cc: DD/S

Personnel

OGC/JSW:mks (1 June 1956)

SECRET

MISSING PAGE

ORIGINAL DOCUMENT MISSING PAGE(S):

Attachment